THE MORELAND CORPORATION

LEASE NO. 084B-001-94 **VABCA-5409R & 5410R**

VA OUTPATIENT CLINIC
LAS VEGAS, NEVADA

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OPINION BY ADMINISTRATIVE JUDGE MCMICHAEL
ON
APPELLANT'S MOTION FOR RECONSIDERATION

Appellant, The Moreland Corporation, has filed a timely MOTION FOR RECONSIDERATION of the Board's decision granting the Government's MOTION FOR SUMMARY JUDGMENT. ***Moreland Corporation***, VABCA No. 5410, 00-1 BCA ¶ 30,640. Familiarity with this opinion is presumed so that recitation of the facts and the bases for our decision therein will not, for the most part, be repeated here. To briefly recapitulate, Moreland had appealed the Contracting Officer's denial of an adjustment to its Lease payments from the VA for space delivered approximately 10% in excess of the amount specified in the Lease. Following submission of the Appeal File, the Government filed its MOTION in which it set forth that Moreland had offered to design, construct and lease a two-story Ambulatory Care Clinic containing 148,260 net usable square feet (nusf) which would meet the Government's requirements as set forth in its Solicitation for Offers. The annual lease payment was determined by multiplying Moreland's

proffered square foot rate of $14.43 against the 148,260 nusf that it offered to provide to the VA. Pointing to explicit language in the Lease which stated that ***"payment will not be made for delivered space which is in excess of 148,260 nusf,"*** the Government argued that it was entitled to summary judgment because the provisions of the Lease were "clear and unambiguous." (Emphasis in the original.)

Prior to responding to the Motion, Moreland sought and was granted an opportunity to engage in document discovery and to depose key witnesses such as the Contracting Officer and on-site VA Las Vegas personnel. Following review of the depositions, the Appeal File, and other documents obtained during discovery, Appellant prepared affidavits/declarations and filed its RESPONSE opposing the Government's motion. As part of its RESPONSE it also submitted a number of its depositions and other documentary evidence obtained, all of which was considered by the Board in its decision. Appellant raised a number of defenses, including contract interpretation, constructive change, misrepresentation and impossibility. After considering the entire record before it and the parties' arguments, the Board granted the Government's MOTION and denied the Appeals.

In its MOTION FOR RECONSIDERATION, Moreland reargues all of the positions previously advanced, challenges some of the Board's Findings of Fact, and seeks to enlarge the record by supplementing a declaration previously submitted by one of its architects. The Government opposes the reconsideration motion on the grounds that Appellant "offers no newly discovered evidence, or legal argumentation to its Motion." In examining the motion, we observe initially that Appellant appears to object both to the Board examining the entire record in making its findings of fact as well as to the inferences that it draws from the record in deciding the motion. Many of the statements contained in the depositions submitted by Appellant had direct relevance to the defenses raised in opposing the Government's summary judgment motion. Appellant was presumably aware of these sworn statements

when it prepared its declarations, which we found were too often vague, indefinite or ignored key matters raised by the depositions and documents. In examining that record we concluded that there were "certainly some disputed facts, but none of which we find to be material to disposition of the MOTION." Our long-standing practice of considering the entire record—much of it supplied by Moreland and none of which it objected to—is consistent with the general practice of other Boards. As one commentator has noted:

> The Board will not necessarily restrict itself to a consideration of the factual issues raised by the parties. It may also examine pleadings and other documents to satisfy itself under any applicable theory there remain no unresolved material factual issues. In this process, the Board will ultimately examine the *entire record* of the appeal.

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In its MOTION FOR RECONSIDERATION Moreland reargues its position that, irrespective of the explicit Lease language stating ***"payment will not be made for delivered space which is in excess of 148,260 nusf,"*** the Lease was "ambiguous" and susceptible to other interpretations. Notwithstanding Appellant's assertion that we "misunderstood" its position, the Board thoroughly considered and rejected its contentions which we found to be non-persuasive and not in accord with settled rules of contract interpretation. Motions for Reconsideration which do not allege newly discovered evidence or which merely repeat arguments which were fully considered by the Board in reaching its decision are ordinarily denied. ***Dawson Construction Company, Inc.,*** VABCA No. 1711, 84-3 VCA ¶ 17,620.

Apart from the issues of contract interpretation, the key elements of Appellant's various theories of recovery are founded either upon a misstatement

by the Contracting Officer concerning the amount of net usable space to be found in Schedule D, or upon an early comment by a VA official interpreted by Appellant as agreeing to amend the Lease to pay for whatever additional space was delivered. The gravamen of Moreland's misrepresentation claim is that it detrimentally relied on the Contracting Officer's oral response to a pre-submission briefing question concerning net usable square feet contained in the "conceptual design" Schedule D layout and internal adjacency drawings. Asked whether the three-story layout design depicted therein would yield 148,000 net usable square feet, the CO responded that it would. In his original declaration, Moreland's architect, Marc Schiff, stated that he simply "assumed" that the VA had "accurately measured the net usable square footage of the facility represented in the Schedule D drawings," and thus saw no need to verify them.

In the supplemental declaration Appellant proffers to the Board, Mr. Schiff now states he was in attendance at the pre-submission briefing and left with "the clear understanding" that the Schedule D drawings contained 148,090 net usable square feet because he "relied upon the statements" of the Contracting Officer. Appellant is silent on why this statement was not originally included in its Response to the Government's Motion. Notwithstanding this lapse, and noting that the Government has interposed no objection to its consideration, we will in the exercise of our discretion consider the additions above as part of the record. Whether such misstatement by the Contracting Officer would have justified the A/E's reliance when preparing drawings in light of the undisputed facts enumerated in our opinion is questionable. But of greater importance, whether or not the A/E relied on the Contracting Officer's presubmission statement, is that it is not material to the dispute inasmuch as Moreland's proposal was for a different building of its own design. This design, requiring alteration of the Government provided three-story layout into a new two-story structure, obviously required

independent calculation by Appellant to arrive at space allocations between the different floors as well as to ascertain if its proposal met solicitation requirements. Under the circumstances we found that recovery based upon "misrepresentation" could not be justified on the facts before us.

A correction to our Decision is in order, however, with respect to our findings concerning the drawings submitted by Moreland in connection with its Best and Final Offer. We stated that these drawings indicated that the "interior space of the two-story building was 198,000 g[ross] s[quare] f[eet] (1st fl 110,000; 2nd fl 88,000) and that the usable space being offered was ***149,643*** n[et] u[sable] s[quare] f[eet] which is listed as ***80,763*** for the first floor and ***68,880*** for the second floor." 00-1 BCA at 151,288; slip op. at 24-25 A re-examination of the drawings reveals that the terms "total square footage "and "total useable footage" were employed rather than the terms "gross square feet" and "net usable square feet," respectively. This correction, however, does not alter our conclusion that, in calculating and assigning space for the new two story building of its own design, "any questions of 'impossibility,' . . . would have been clearly evident." 00-1 BCA at 151,298; slip op. at 49.

Appellant raised the question of "impossibility" for the first time after the Government filed its summary judgment motion when Appellant's president declared that he did "not *now* believe it possible to create a building incorporating the Schedule D requirements and the Schedule C requirements in a space containing 148,260 nusf or less." (Emphasis added.) Subsequent to our decision, Appellant now seeks to supplement the A/E's declaration. Mr. Schiff states that it "is impossible to maintain the layout and adjacencies of Schedule D . . . as well as the room sizes of Schedule C of the same solicitation and remain within 148,260 net useable square feet for the structure." This was, he says, "adequately demonstrated in the Fall of 1995"—prior to the 35% submittal drawings—when

the A/E "spent numerous man hours attempting to accomplish the feat by changing various room configurations and locations, and changing the structural column spacing, all without success in appreciably reducing the net useable square footage for the structure to 148,260." Left unexplained is why *after* its 35% submittal, Moreland in its loan commitment papers adjusted the gross square footage of the building from 198,000 to 186,967 but left the net usable square footage unchanged at 148,260.

Of greater significance, the record is devoid of any notice to the CO either that Moreland could not comply with the terms of the agreement or that it was being directed by Las Vegas officials to provide more space than required by the Lease. The virtual absence of anything in the record concerning what should have been a central issue to be resolved by Moreland with the VA is apparently justified on the basis of a single conversation between Terry Moreland and the Las Vegas Medical Center's Director's Executive Assistant, Alan Tyler. Terry Moreland's declaration was that Tyler told him in the Fall of 1995 that "any increase in the nusf would be dealt with at the project completion in an audit." Appellant did not contravert the Contracting Officer's affidavit that "[a]t no time during the design phase of the subject space did The Moreland Corporation request additional compensation due to an increase in the net usable square feet of the building." In our findings we noted that Las Vegas officials obviously sought to maximize usable space within the large footprint initially provided by Appellant. Thus, VA employees Tyler and Glommen resisted design reductions in the size of the building until told by the Contracting Officer that Moreland had every right to do so. The Contracting Officer further reassured Moreland that its only obligation was "to provide 148,260 nusf" as required by the Lease agreement.

Thereafter, Moreland neither notified the Contracting Officer of its conclusion that it was "impossible" to comply with the Lease requirements nor did

they complain to him of Tyler and Glommen's "direction . . . to change certain room sizes" which had the effect of adding 2,000 net square feet to the building. While Las Vegas officials could increase or decrease individual rooms during the design process, they did not have the authority to alter the Lease by increasing the total amount of space being provided. Rather than heed the clear direction of the Contracting Officer, or seek additional clarification or resolution of any continuing issues, Appellant inappropriately chose instead to rely on the earlier remark of the hospital director's executive assistant.

In sum, neither of the crucial facts relied upon by the Appellant are sufficient in the context of the record before us to deny the Government's MOTION FOR SUMMARY JUDGMENT.

DECISION

For the foregoing reasons, the Appellant's MOTION FOR RECONSIDERATION in the Appeals of The Moreland Corporation, VABCA-5409 & 5410 is Denied.

DATE: **May 17, 2000**

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GUY H. MCMICHAEL III
Chief Administrative Judge
Panel Chairman

We Concur:

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MORRIS PULLARA, JR.
Administrative Judge

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RICHARD W. KREMPASKY
Administrative Judge